

AO 242 (12/11) Petition for a Writ of Habeas Corpus Under 28 U.S.C. § 2241

UNITED STATES DISTRICT COURT
for the
District of Arizona

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<div style="border: 1px solid black; padding: 5px; margin: 0 auto; width: 80%;"> DEC - 9 2021 </div>	
CLERK U.S. DISTRICT COURT DISTRICT OF ARIZONA	
BY	DEPUTY

VICTOR LEE MCNEARY, JR.

Petitioner

v.

 WARDEN CAMPOS
 Warden, FCI Safford
*Respondent**(name of warden or authorized person having custody of petitioner)*
 Case No. CV-21-00514-TUC-JAS--MSA
(Supplied by Clerk of Court)

PETITION FOR A WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2241

Personal Information

1. (a) Your full name: Victor Lee McNeary, Jr.
 (b) Other names you have used: N/A
2. Place of confinement:
 (a) Name of institution: FCI Safford
 (b) Address: P.O. Box 9000
 Safford, AZ 85548
 (c) Your identification number: Reg. No. 23765-045
3. Are you currently being held on orders by:
☒ Federal authorities ☐ State authorities ☐ Other - explain: _____
4. Are you currently:
☐ A pretrial detainee (waiting for trial on criminal charges)
☒ Serving a sentence (incarceration, parole, probation, etc.) after having been convicted of a crime
 If you are currently serving a sentence, provide:
 (a) Name and location of court that sentenced you: Western District of Missouri (Jefferson City)
 (b) Docket number of criminal case: 2:12-cr-04010-SRB-1
 (c) Date of sentencing: 06/12/2015
☐ Being held on an immigration charge
☐ Other (explain): N/A

Decision or Action You Are Challenging

5. What are you challenging in this petition:

- ☐ How your sentence is being carried out, calculated, or credited by prison or parole authorities (for example, revocation or calculation of good time credits)
- ☐ Pretrial detention
- ☐ Immigration detention
- ☐ Detainer
- ☒ The validity of your conviction or sentence as imposed (for example, sentence beyond the statutory maximum or improperly calculated under the sentencing guidelines)
- ☐ Disciplinary proceedings
- ☐ Other (explain): _____

6. Provide more information about the decision or action you are challenging:

(a) Name and location of the agency or court: Western District of Missouri (Jefferson City)

(b) Docket number, case number, or opinion number: 2:12-cr-04010-SRB-1

(c) Decision or action you are challenging (for disciplinary proceedings, specify the penalties imposed):

Validity of the Firearm Charge and ACCA Enhancement.

(d) Date of the decision or action: 06/12/2015

Your Earlier Challenges of the Decision or Action

7. **First appeal**

Did you appeal the decision, file a grievance, or seek an administrative remedy?

☒ Yes ☐ No

(a) If "Yes," provide:

(1) Name of the authority, agency, or court: United States of Court Appeals for the Eighth Circuit

(2) Date of filing: 03/21/2016

(3) Docket number, case number, or opinion number: No. 16-1695

(4) Result: Denied

(5) Date of result: 04/20/2016

(6) Issues raised: _____

(b) If you answered "No," explain why you did not appeal: _____

8. **Second appeal**

After the first appeal, did you file a second appeal to a higher authority, agency, or court?

☐ Yes

☒ No

(a) If "Yes," provide:

(1) Name of the authority, agency, or court: _____

(2) Date of filing: _____

(3) Docket number, case number, or opinion number: _____

(4) Result: _____

(5) Date of result: _____

(6) Issues raised: _____

(b) If you answered "No," explain why you did not file a second appeal: Appeal was denied as untimely.

9. **Third appeal**

After the second appeal, did you file a third appeal to a higher authority, agency, or court?

☐ Yes

☐ No

(a) If "Yes," provide:

(1) Name of the authority, agency, or court: _____

(2) Date of filing: _____

(3) Docket number, case number, or opinion number: _____

(4) Result: _____

(5) Date of result: _____

(6) Issues raised: _____

(b) If you answered "No," explain why you did not file a third appeal: N/A

10. **Motion under 28 U.S.C. § 2255**

In this petition, are you challenging the validity of your conviction or sentence as imposed?

☒ Yes ☐ No

If "Yes," answer the following:

(a) Have you already filed a motion under 28 U.S.C. § 2255 that challenged this conviction or sentence?

☒ Yes ☐ No

If "Yes," provide:

(1) Name of court: Western District of Missouri (Jefferson City)

(2) Case number: 2:16-cv-04169-GAF

(3) Date of filing: 06/13/2016

(4) Result: Denied

(5) Date of result: 03/13/2018

(6) Issues raised: McNeary raised the following grounds for relief:

- Johnson Claim;

- Ineffective assistance of counsel; and

- Government committed misconduct by failing to preserve the dash cam video of his arrest.

(b) Have you ever filed a motion in a United States Court of Appeals under 28 U.S.C. § 2244(b)(3)(A), seeking permission to file a second or successive Section 2255 motion to challenge this conviction or sentence?

☐ Yes ☒ No

If "Yes," provide:

(1) Name of court: _____

(2) Case number: _____

(3) Date of filing: _____

(4) Result: _____

(5) Date of result: _____

(6) Issues raised: _____

- (c) Explain why the remedy under 28 U.S.C. § 2255 is inadequate or ineffective to challenge your conviction or sentence: § 2255 is inadequate or ineffective by satisfying the following conditions:
- (1) "the existence of a new interpretation of statutory law,"
- (2) "issued after the petitioner had a meaningful time to incorporate the new interpretation into his direct appeals or subsequent motions,"
- (3) that is retroactive, and
- (4) applies to the petition's merits such that it is "more likely than not that no reasonable juror would have convicted" the petitioner.

11. **Appeals of immigration proceedings**

Does this case concern immigration proceedings?

☐ Yes ☒ No

If "Yes," provide:

- (a) Date you were taken into immigration custody: _____
- (b) Date of the removal or reinstatement order: _____
- (c) Did you file an appeal with the Board of Immigration Appeals?
- ☐ Yes ☐ No

If "Yes," provide:

- (1) Date of filing: _____
- (2) Case number: _____
- (3) Result: _____
- (4) Date of result: _____
- (5) Issues raised: _____

- (d) Did you appeal the decision to the United States Court of Appeals?

☐ Yes ☒ No

If "Yes," provide:

- (1) Name of court: _____
- (2) Date of filing: _____
- (3) Case number: _____

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- (4) Result: _____
- (5) Date of result: _____
- (6) Issues raised: _____
- _____
- _____
- _____
- _____
- _____

12. Other appeals

Other than the appeals you listed above, have you filed any other petition, application, or motion about the issues raised in this petition?

☐ Yes☒ No

If "Yes," provide:

- (a) Kind of petition, motion, or application: Motion for Compassionate Release
- (b) Name of the authority, agency, or court: Western District of Missouri (Jefferson City)

- (c) Date of filing: 05/11/2020
- (d) Docket number, case number, or opinion number: 2:12-cr-04010-SRB-1, Doc. 154
- (e) Result: Denied
- (f) Date of result: 06/08/2020
- (g) Issues raised: McNeary argued his race, hypertension, and high blood pressure put him at a heightened risk of death should he contract COVID-19.
- _____
- _____
- _____
- _____
- _____

Grounds for Your Challenge in This Petition

13. State every ground (reason) that supports your claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

GROUND ONE: McNeary's prosecution under 18 U.S.C. § 922(g) is null and void because the Government was not able to prove both that McNeary knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm.

(a) Supporting facts *(Be brief. Do not cite cases or law.)*:

In light of *Rehaif v. United States*, 139 S. Ct. 2191 (2019), Garza's prosecution under 18 U.S.C. § 922(g) is null and void because the Government was not able to prove both that Garza knew he possessed a firearm and that Garza knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm.

Please see Memorandum of Law in Support.

(b) Did you present Ground One in all appeals that were available to you?

☐ Yes

☒ No

GROUND TWO: The District Court erred in classifying McNeary as an Armed Career Criminal based on his multiple prior sentences for robbery-- which were counted as a single offense.

(a) Supporting facts *(Be brief. Do not cite cases or law.)*:

Please see Memorandum of Law in Support.

(b) Did you present Ground Two in all appeals that were available to you?

☐ Yes

☒ No

GROUND THREE: N/A

(a) Supporting facts *(Be brief. Do not cite cases or law.)*:

(b) Did you present Ground Three in all appeals that were available to you?

☐ Yes

☐ No

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GROUND FOUR: N/A

(a) Supporting facts (*Be brief. Do not cite cases or law.*):

(b) Did you present Ground Four in all appeals that were available to you?

☐ Yes

☐ No

14. If there are any grounds that you did not present in all appeals that were available to you, explain why you did not:

Request for Relief

15. State exactly what you want the court to do: McNeary's sentence should be vacated for resentencing. In the alternative, an evidentiary hearing should be held so that McNeary may further prove his meritorious ground for relief, resolve any disputed facts, and expand an incomplete record.

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Declaration Under Penalty Of Perjury

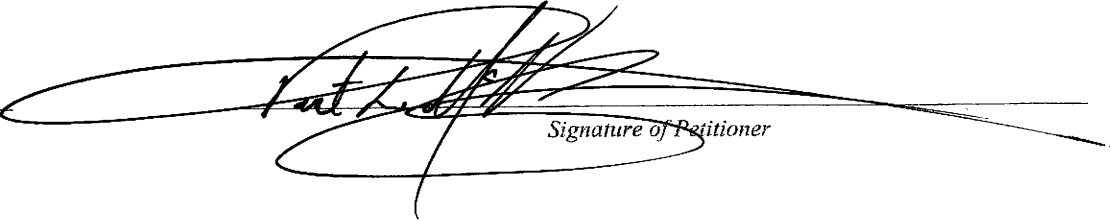
If you are incarcerated, on what date did you place this petition in the prison mail system:

Nov. 16, 2021

I declare under penalty of perjury that I am the petitioner, I have read this petition or had it read to me, and the information in this petition is true and correct. I understand that a false statement of a material fact may serve as the basis for prosecution for perjury.

Date:

Nov 16, 2021



Signature of Petitioner

Signature of Attorney or other authorized person, if any

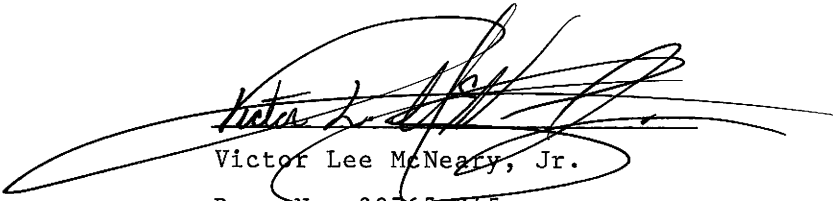
CERTIFICATE OF SERVICE

I certify that on November 16, 2021, a true and correct copy of the Petition For A Writ Of Habeas Corpus Under 28 U.S.C. §2241 was served by U.S. Postal Service, Certified Mail and internal mail on:

28 U.S.C. § 1746.

MS. DEBRA D. LUCAS
Clerk of Court
U.S. District Court
District of Arizona
Tucson Division
405 W. Congress Street, Suite 1500
Tucson, AZ 85701-5010

WARDEN CAMPOS
Warden
FCI Safford
1529 W. US Hwy 366
Safford, AZ 85546



Victor Lee McNeary, Jr.

Reg. No. 23763-045

P.O. Box 9000

Safford, AZ 85548